PUBLIC PROSECUTOR

v.

HARUN MUHAMMAD NUSI

HIGH COURT MALAYA, KUALA LUMPUR
SHAIK DAUD ISMAIL J
[CRIMINAL APPEAL NO. 39 OF 1984]
11 APRIL 1985

CRIMINAL LAW AND PROCEDURE: *Offence under s. 6 of Dangerous Drugs Act - Prima facie case established - Defence called - Respondent acquitted and discharged by learned Magistrate on ground that he had cast a doubt - Witnesses not called by prosecution - Whether unfavourable inferences under s. 114(g) of Evidence Act - Duty of appellate Court.*

This is an appeal from the decision of learned Magistrate who acquitted and discharged the respondent who had been charged for an offence under s. 6 of the Dangerous Drugs Act 1952.

The facts of the case were that on 3 October 1983 at about 6.25 a.m. the respondent was seen carrying a package and knocking on the door of a house where police officers had earlier laid an ambush. On seeing the police, the respondent dropped the package. After hearing submission of no case to answer the learned Magistrate held that a *prima facie* case had been made out and called upon the respondent to enter his defence. After hearing the defence, the learned Magistrate said that the respondent had cast a doubt and acquitted and discharged him. The reasons for acquittal were that:

(i) it was merely suspicion that the respondent was in possession of the package which contained cannabis;

(ii) the package could have been there before the respondent reached the place;

(iii) the Court invoked s. 114(g) of the Evidence Act because certain witnesses were not called by the prosecution.

Held:

[1] Having called for the defence it must be obvious that the learned Magistrate accepted the evidence of the police personnel as to the arrest, possession and recovery of the package which contained the cannabis. When the respondent merely denied holding the package the learned Magistrate accepted this as casting a doubt on the prosecution's case without elaborating what that doubt was. A Magistrate is entitled to believe or disbelieve a witness or to entertain doubts but such belief or disbelief or doubts should be supported by reasons.

[2] The reason given by the Magistrate that the package could have been there before the respondent reached the place was a pure conjecture as there is no basis for this contention. The Magistrate had also ignored the evidence recorded by herself to the effect that the respondent acknowledged that he was holding the package when he went to the house.

[3] It is settled law that the calling of witnesses was entirely a matter for the prosecution. Unless it can be shown by evidence that in not calling any particular witness, the prosecution had some oblique motive, or something vital to conceal, no inferences unfavourable to the prosecution should be made by the trial Court.

[4] Where the trial Magistrate clearly erred in assessment of the facts adduced or drew wrong inferences from them, it is the duty of the appellate Court to interfere.

[Appeal allowed. Order of acquittal and discharge set aside. Re-trial before another Magistrate ordered.]

Cases referred to:
Mat v. PP [1963] MLJ 263
Khoo Chye Hin v. PP [1961] MLJ 105
Samsuddin v. PP [1962] MLJ 405

Legislation referred to:
Dangerous Drugs Act 1952, s. 4, 5, 6
Evidence Act 1950, s. 114illus.(g)

JUDGMENT

Shaik Daud Ismail J:

This is an appeal from the decision of learned Magistrate who acquitted and discharged the respondent who had been charged for an offence under s. 6 of the Dangerous Drugs Act, 1952. The respondent was charged in the Magistrate's Court as follows:

> That you on 3 October 1983 at about 6.25 a.m. in front of house No. 6 Jalan Melati, Kg. Raja Uda, Pelabuhan Kelang, in the district of Kelang, in the state of Selangor, did have in your possession of (100) rolls of cannabis weighing 40.74 grams and that you not being a person authorised in accordance with an authorisation as referred to under s. 4 or 5 of the Dangerous Drugs Act committed an offence punishable under s. 6 of the same Act.

The main witnesses called by the prosecution to prove the charge consists of police personnel who arrested the respondent. Inspector Md. Zam bin Mohd. Zain (PW2) testified that on 3 October 1983 at about 6.30 a.m. as a result of information received he led a police party consisting of DPC 58511 Mohd. Nor, DPC 49808 Ahmad b. Abbas and PC 73020 Md. Saudin to a house at No. 6 Jalan Melati, Kg. Raja Uda, Pelabuhan Kelang. There he and his men laid an ambush. A short while later he saw the figure of a man going towards the house and knocked on the door. When the door was opened he saw clearly from the light inside the house and the street light outside the man who came and knocked on the door. He clearly saw the man holding a package with one hand and a crash helmet with the other hand. On seeing this he directed his men to rush forward. At that moment he saw the man dropping the package. The man was arrested after a struggle and the package recovered where it dropped. The man arrested was identified as the respondent.

DPC 49808 Ahmad b. Abbas (PW1) confirmed and corroborated the evidence of PW2. He too saw the man who he later identified as the respondent coming up to the door of the house with a package in one hand and a crash helmet in the other. When the door of the house was opened he could clearly see the respondent with the package. When PW2 gave the order to rush out respondent dropped the package he was holding. He arrested the respondent who tried to struggle. The package was later found to contain 100 rolls of cannabis weighing 40.74 grammes.

At the close of the prosecution case the prosecuting officer made several witnesses available to the defence and they include three police personnel and two civilians namely one Laila binti Yunus and Annuar bin Abu Hassan. The respondent was represented by Counsel at the trial and Counsel informed the Court that he did not wish to call any of the witnesses made available to the defence.

After hearing submission of no case to answer the learned Magistrate found that from the testimony of all the witnesses called by the prosecution a *prima facie case* had been made out and called upon the respondent to enter his defence.

The respondent elected to give evidence on oath and the gist of his evidence was a total denial of possession of the package which contained the cannabis. He admitted going to the house on the morning in question. He said that he wanted to see his friend Annuar at the house. On knocking on the door Annuar's wife opened the door. Respondent said when he asked for Annuar, 2 or 3 people rushed and arrested him. He tried to avoid arrest but was unsuccessful, and he was then handcuffed and searched but nothing was found on him. He said he was then assaulted and PW2 ordered the house to be searched. About 10 minutes later he said PW2 showed him a package and said it was his. He denied any knowledge of the packet.

After hearing the testimony of the respondent the learned Magistrate said that the respondent had cast a doubt and acquitted and discharged him.

In her scanty grounds of decision, the learned Magistrate gave four reasons for acquittal. I now reproduce these four grounds:

(1) The exhibits were found on the ground and not in the accused's possession. It was merely suspicion that the accused was in possession of the exhibits. Mere suspicion in law is not entitled for conviction.

(2) The time when the incident happened was about 6.25 a.m. It was dark. The exhibits could have been there before the accused reached the place.

(3) Neither Annuar nor Laila were called by the prosecution or the accused. If the prosecution had called Annuar or Laila, it would have strengthened the prosecution's case. There is a possibility that Laila could have thrown the exhibits as soon as she opened the door, and that is the time the prosecution witnesses could have seen the exhibits because the light was coming out from Laila's house. Therefore, the Court invoked s. 114 (g) of the Evidence Act.

(4) In the case of *Mat v. PP* [1963] MLJ 263, Suffian J held that the Magistrate who does not accept or believe the accused's explanation, does not convict him but considers further. If the Magistrate does not accept or believe the accused's explanation, but nevertheless it raises in his/her mind a reasonable doubt as to his guilt, shall acquit him.

To my mind there are in fact only three reasons as the fourth is merely reproducing a principle enunciated by Suffian J (as he then was) in *Mat v. PP* (1963) MLJ 263, and not a reason for acquittal.

Having called for the defence it must be obvious that the learned Magistrate accepted the evidence of the police personnel as to the arrest, possession and recovery of the package which contained the cannabis. When the respondent merely denied holding the package the learned Magistrate accepted this as casting a doubt on the prosecution's case. What that doubt is, is not clear as she did not elaborate. In her first reason she said that the package was found on the ground and not in the respondent's possession and that it was merely suspicion that the respondent had possession. Surely this was also the position when prosecution closed its case and yet she held a *prima facie* case had been made out. What made the learned Magistrate to make a complete turn and now disbelieve PW1, and PW2, is not clear at all. She has in fact not said that she disbelieved PW1 and PW2 or that she

believed the respondent. What in effect she is saying in her grounds of judgment is that she believed the respondent but unfortunately she has not given any reasons for this. A Magistrate is always entitled to believe or disbelieve a witness but it is not enough to just say you believe or disbelieve a witness without giving any cogent reasons. A Magistrate is also entitled to hold that he or she entertain doubts but what the doubts are and their reasons should also be given.

For the second reason she said that the time of the incident was about 6.25 a.m. and it was dark. Again this was also the evidence before her that it occurred at 6.25 a.m. This was confirmed by both PW1 and PW2 and yet at that stage the learned Magistrate did not say that it was dark. She also said that the exhibits could have been there before respondent reached the place. This to my mind is pure conjecture as there is no basis for this contention. As to the possession of the package by respondent it is also in evidence that the defence appear to admit that respondent actually had the package with him when he went to the house. In cross-examination of PW1 it was put to him by learned Counsel that just before respondent knocked on the door he released the package as opposed to PW1's testimony that the respondent released the package after the door was opened. To my mind by this, the respondent acknowledged that he was holding the package when he went to the house. This and the evidence of PW1 and PW2 as to what they saw clearly established that respondent had actual physical possession of the package which later was found to contain cannabis. The learned Magistrate completely ignored these facts and I would hold that she was clearly in error when such evidence were amply clear and recorded by herself.

For her third reason she not only commented on the prosecution not calling two civilian witnesses namely Laila and Annuar but drew unfavourable inferences against the prosecution by invoking s. 114(g) of the Evidence Act. It is on record, and recorded by the learned Magistrate herself, that these two witnesses, among others, were made available to the defence at the close of the prosecution case and yet the learned Magistrate invoked s. 114(g) of the Evidence Act 1950 against the prosecution for failure to call these two witnesses.

It is settled law that the calling of witnesses was entirely a matter for the prosecution. *See Khoo Chye Hin v. PP* [1961] MLJ 105. I see nothing improper in this case in the prosecution not calling them and making them available for the defence. Unless it can be shown by evidence that in not calling any particular witness, the prosecution had some oblique motive, or something vital to conceal, no inferences unfavourable to the prosecution should be made by the trial Court.

The Court of Appeal in *Samsuddin v. PP* [1962] MLJ 405 at 407 on this issue had this observation to make:

> It is clear from these authorities that the prosecutor has a discretion and also that if he does not call material witness who are available he runs the risk of having the presumption in illustration (g) of s. 114 of the Evidence Ordinance raised against him. In the present case there was no attempt at concealment, no suggestion, as was said by Lord Thankerton in the case of *Adel Muhammed El Dabbah v. Attorney-General of Palestine* that the prosecutor has been influenced by some oblique motive. The witnesses were freely offered to the defence and in our opinion the presumption did not arise.

In our present case there was also no attempt at concealment or a suggestion that the prosecutor was influenced by any oblique motive and similarly the two witnesses were freely offered to the defence, and yet the learned Magistrate invoked the presumption. To my mind in doing this she was clearly in error. I would therefore hold that the presumption does not arise in the present case.

Not only did the learned Magistrate wrongly invoked the presumption under s. 114(g) of the Evidence Act against the prosecution but she even ventured into the realm of conjecture without any basis or without the support of any evidence at all when she said that Laila or Annuar could have possibly strengthened the prosecution case and in the next breath she added that Laila could have thrown the exhibits as soon as the door was open. All these are mere conjecture without the support of any evidence either from the prosecution or from the defence.

I am mindful that generally an appellate Court would be slow in disturbing the finding of fact by a trial Magistrate but where the trial Magistrate clearly erred in assessment of the facts adduced or drew wrong inferences from them, it is the duty of the appellate Court to interfere. For the reasons I stated above I would allow this appeal, set aside the order of acquittal and discharge and order a re-trial before another Magistrate.

Also found at [1985] 2 CLJ 55